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7 HARTFORD FIRE INSURANCE
8 COMPANY,

9 Plaintiff,

10 v.

11 TURNER/DEVCON,

12 Defendant.

13 TURNER/DEVCON,

14 Third-Party Plaintiff,

15 v.

16 ALTERRA AMERICA INSURANCE
17 COMPANY,

18 Third-Party Defendant.

19 Case No. 19-cv-01622-NC

20 **ORDER GRANTING
PLAINTIFF AND THIRD-
PARTY DEFENDANT'S
MOTIONS FOR SUMMARY
JUDGMENT**

21 Re: Dkt. Nos. 65, 66

22 Before the Court is plaintiff Hartford Fire Insurance and third-party defendant
23 Alterra America Insurance Company's motion for summary judgment. *See* Dkt. Nos. 65,
24 66. Both parties argue that they do not have a duty to defend defendant Turner/Devcon in
25 connection with an underlying Americans with Disabilities Act ("ADA") lawsuit. The
26 Court previously confronted an identical dispute between Turner/Devcon and third-party
27 defendant Westchester Surplus Lines Insurance Company. *See* Dkt. No. 57. Because
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1 Turner/Devcon has not meaningfully distinguished the current dispute from its previous
2 dispute with Westchester, the Court GRANTS Hartford and Alterra's motions for
3 summary judgment.

4 **I. Background**

5 The background facts are undisputed. In 2016, Abdul Nevarez sued the City of
6 Santa Clara, the Forty Niners football team, and related corporate entities alleging that the
7 Forty Niners' stadium lacked sufficient public accommodations, such as accessible seating,
8 restrooms, and signage. *See Nevarez v. Forty Niners Football Co., LLC*, Case No. 16-cv-
9 07013-LHK (N.D. Cal.), Dkt. No. 195 ("Nevarez Compl.") ¶ 13. Nevarez brought putative
10 class claims under the Americans with Disability Act ("ADA") and California's Unruh
11 Act. *Id.* ¶¶ 84 – 117.

12 The Forty Niners, in turn, sued Turner/Devcon, who built the stadium. *See*
13 *Nevarez*, Dkt. No. 107 ("Niners Compl."). In their third-party complaint, the Forty Niners
14 seek equitable indemnity, alleging that any liability was caused by Turner/Devcon's
15 negligence. *Id.* ¶ 9. The Forty Niners also allege that Turner/Devcon contractually agreed
16 to indemnify them for any suit relating to "penalties or fines levied or assessed for
17 violations of any Legal Requirement." *Id.* ¶ 13. Both Nevarez and the Forty Niners'
18 lawsuits are still pending.

19 This lawsuit was brought by Hartford, who seeks declaratory relief that it owes
20 Turner/Devcon no duty to defend or indemnify in connection with the *Nevarez* lawsuit.
21 *See* Dkt. No. 1. Turner/Devcon countersued and also brought claims against Westchester
22 and Alterra seeking to compel their defense. *See* Dkt. Nos. 18, 19. The Court granted
23 Westchester's motion to dismiss and dismissed Westchester on August 9, 2019, finding
24 that the underlying facts in the *Nevarez* lawsuit did not constitute an "occurrence" under
25 California law. *See* Dkt. No. 57.

26 Hartford and Alterra now move for summary judgment on identical grounds. *See*
27 Dkt. Nos. 65, 66. All parties have consented to the jurisdiction of a magistrate judge. *See*
28 Dkt. Nos. 10, 16, 32, 33.

II. Legal Standard

Under Federal Rules of Civil Procedure 56(a), a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Under Rule 56, the moving party bears the initial burden to demonstrate the absence of a genuine issue of material fact. Once the moving party meets its burden, then the non-moving party must cite “particular parts of materials in the record” showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A “genuine issue” exists if a reasonable jury could find for the non-moving party. E.g., *Open Text v. Box, Inc.*, No. 13-cv-04910-JD, 2015 WL 428365, at *1 (N.D. Cal. Jan. 30, 2015). On summary judgment, the Court does not make credibility determinations or weigh conflicting evidence, as these determinations are left to the trier of fact at trial. *Bator v. State of Hawaii*, 39 F.3d 1021, 1026 (9th Cir. 1994).

III. Discussion

Hartford and Alterra’s motions for summary judgment largely retrace Westchester’s motion to dismiss.¹ Put briefly, Hartford and Alterra contend that they have no duty to defend Turner/Devcon in connection with the *Nevarez* lawsuit because the construction of the Forty Niners’ stadium was an intentional act, which is not a covered “occurrence” under its policy.

In the previous order granting Westchester’s motion to dismiss, the Court followed *Modern Dev. Co. v. Navigators Ins. Co.*, 111 Cal. App. 4th 932, 943 (2003) and *Pacatte Constr. Co. v. AMCO Ins. Co.*, No. 12-cv-01472-JST, 2013 WL 2153675, at *5–6 (N.D. Cal. May 16, 2013), which tackled similar duty to defend claims with underlying ADA lawsuits. In both cases, the courts reasoned that constructing a building in a particular manner was a deliberate act. Because Westchester’s policy only covers “occurrences” or “accidents,” it did not cover Turner/Devcon’s construction of the Forty Niners’ stadium.

¹ The arguments made in the parties’ briefing also reflects arguments made in Turner/Devcon’s prior motion for reconsideration. See Dkt. Nos. 58, 59.

1 The same reasoning applies here. Hartford covers “occurrences” that are defined
2 the same way as in Westchester’s policy. *See* Dkt. No. 36-2, Ex. D § III.B; Dkt. No. 36-2,
3 Ex. E § V.16. Likewise, as an excess insurer, Alterra provides coverage only if
4 Westchester provides coverage. *See* Dkt. No. 66-1, Ex. A. Thus, Hartford and Alterra do
5 not owe Turner/Devcon a duty to defend in the underlying *Nevarez* lawsuit.

6 Turner/Devcon offers two new arguments in support of its position. Neither are
7 persuasive.

8 First, Turner/Devcon points out that Hartford originally accepted its duty to defend
9 by letter in August 2018. *See* Dkt. No. 68-1. In that letter, Hartford acknowledged that the
10 *Nevarez* plaintiffs’ third amended complaint asserted liability caused by an “occurrence.”
11 *See id.* at 1, 4. According to Turner/Devcon, Hartford could not subsequently withdraw its
12 defense when the *Nevarez* plaintiffs filed their fourth amended complaint. However,
13 Hartford’s initial defense of the third amended complaint was “subject to a full reservation
14 of rights.” *Id.* at 1. Under California law, “waiver requires the insurer to intentionally
15 relinquish its right to deny coverage.” *Ringler Assocs. Inc. v. Md. Cas. Co.*, 80 Cal. App.
16 4th 1165, 1188 (2000).

17 Second, Turner/Devcon attempts to distinguish Hartford’s duty to defend from
18 Westchester’s duty. The Westchester policy describes Westchester’s “the right and . . .
19 opportunity to be associated with the defense” (*see* Dkt. No. 36-6 § C.1), while the
20 Hartford policy makes clear that it has an intrinsic duty to defend (*see* Dkt. No. 36-7).
21 This distinction is unconvincing. Westchester’s policy simply describes its role as an
22 excess insurer who does not have to step in until Turner/Devcon exhausts its primary
23 coverage. In any case, the reasoning in *Modern Development* and *Pacatte* are equally
24 applicable to excess and primary insurers.

25 **IV. Conclusion**

26 The Court GRANTS Hartford and Alterra’s motions for summary judgment.
27 Because no claims remain, the Court will enter judgment.

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1 **IT IS SO ORDERED.**
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3 Dated: February 21, 2020

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NATHANAEL M. COUSINS
United States Magistrate Judge